

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CALVIN WRIGHT,

Petitioner,

v.

UNKNOWN, Warden

Respondent.

Civil No. 06-2313 BEN (JMA)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE AND WITH  
LEAVE TO AMEND**

On October 16, 2006, Petitioner, a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition").

**FAILURE TO SATISFY FILING FEE REQUIREMENT**

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than January 12, 2007**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

**FAILURE TO NAME A PROPER RESPONDENT**

Further, review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing

1 Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas  
2 petition fails to name a proper respondent. *See id.*

3 The warden is the typical respondent. However, “the rules following section 2254 do  
4 not specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden  
5 of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of  
6 state penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s  
7 note). If “a petitioner is in custody due to the state action he is challenging, ‘[t]he named  
8 respondent shall be the state officer who has official custody of the petitioner (for example,  
9 the warden of the prison).’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s  
10 note).

11 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ  
12 of] habeas corpus against the State under . . . [whose] authority . . . the petitioner is in  
13 custody. The actual person who is [the] custodian [of the petitioner] must be the  
14 respondent.” *Ashley v. Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement  
15 exists because a writ of habeas corpus acts upon the custodian of the state prisoner, the  
16 person who will produce “the body” if directed to do so by the Court. “Both the warden of a  
17 California prison and the Director of Corrections for California have the power to produce  
18 the prisoner.” *Ortiz-Sandoval*, 81 F.3d at 895.

19 Here, Petitioner has failed to name a Respondent. In order for this Court to entertain  
20 the Petition filed in this action, Petitioner must name the warden in charge of the state  
21 correctional facility in which Petitioner is presently confined or the Secretary of the  
22 California Department of Corrections and Rehabilitation. *Brittingham v. United States*, 982  
23 F.2d 378, 379 (9th Cir. 1992) (per curiam).

#### 24 **FAILURE TO STATE A COGNIZABLE CLAIM**

25 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases,  
26 Petitioner has failed to allege that his state court conviction or sentence violates the  
27 Constitution of the United States.

28 Title 28, United States Code, § 2254(a), sets forth the following scope of review for

1 federal habeas corpus claims:

2           The Supreme Court, a Justice thereof, a circuit judge, or a district  
3           court shall entertain an application for a writ of habeas corpus in  
4           behalf of a person in custody pursuant to the judgment of a State  
5           court only on the ground that he is in custody in violation of the  
6           Constitution or laws or treaties of the United States.

7 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.  
8 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800  
9 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus  
10 claim under § 2254, a state prisoner must allege both that he is in custody pursuant to a  
11 “judgment of a State court,” and that he is in custody in “violation of the Constitution or laws  
12 or treaties of the United States.” *See* 28 U.S.C. § 2254(a) (emphasis added).

13           Here, Petitioner claims that the trial court committed prejudicial error in admitting  
14 certain evidence, the trial court erroneously failed to give certain jury instructions. (Pet. At  
15 6-9.) However, in no way does Petitioner claim he is “in custody in violation of the  
16 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

17           Further, the Court notes that Petitioner cannot simply amend his Petition to state a  
18 federal habeas claim and then refile the amended petition in this case. He must exhaust state  
19 judicial remedies before bringing his claims via federal habeas. State prisoners who wish to  
20 challenge their state court conviction must first exhaust state judicial remedies. 28 U.S.C.  
21 § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
22 remedies, a California state prisoner must present the California Supreme Court with a fair  
23 opportunity to rule on the merits of every issue raised in his or her federal habeas petition.  
24 *See* 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust  
25 state court judicial remedies a petitioner must allege, in state court, how one or more of his or  
26 her federal rights have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364  
27 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations  
28 of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are  
asserting claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For  
example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court

trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.” *Id.* (emphasis added).

Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

The Court also notes that the statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (emphasis added).

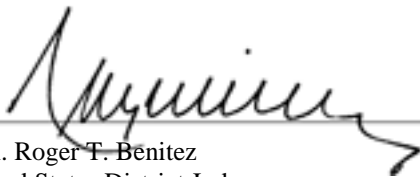
### **CONCLUSION**

Based on the foregoing, the Court **DISMISSES** this action without prejudice because Petitioner has failed satisfy the filing fee requirement, failed to name a proper respondent and failed to state a cognizable federal claim. To have this case reopened, Petitioner must, **no**

1 **later than January 12, 2007**, (1) pay the filing fee or provide adequate proof of his inability  
2 to pay **and** (2) file a First Amended Petition that cures the pleading deficiencies set forth  
3 above. **For Petitioner's convenience, the Clerk of Court shall attach to this Order, a**  
4 **blank motion to proceed in forma pauperis and a blank First Amended Petition for**  
5 **Habeas Corpus form.**

6 **IT IS SO ORDERED.**

7  
8 DATED: December 11, 2006

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11 Hon. Roger T. Benitez  
12 United States District Judge  
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